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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ISKANDAR E. MARDELLI,

Defendant and Appellant.

B207078

(Los Angeles County  
Super. Ct. No. GA056969-01)

APPEAL from a judgment of the Superior Court of Los Angeles County. Candace J. Beason, Judge. Affirmed.

Nasatir, Hirsch, Podberesky & Genego and William J. Genego for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan S. Pithey and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

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Iskandar Mardelli, a physician, appeals from the judgment entered following a court trial that resulted in his conviction of sexual battery by fraud. (Pen. Code, § 289, subd. (d).)<sup>1</sup> He contends the prosecution offered insufficient evidence to prove he touched the intimate parts of a patient for the purpose of sexual arousal or gratification. We affirm the judgment.

## **BACKGROUND**

The evidence introduced at trial showed the following facts: On May 8, 2003, 20-year-old Sofia G. made an appointment to see him in his medical office, presenting with a rash on her upper lip that had persisted for about a year and appeared to be getting larger. She sought referral to a dermatologist. Blue Cross, of which she was a member, required that specialist referrals be made by the patient's primary care physician. Sofia G. had not seen a physician in five or six years and had no primary care doctor. She agreed to make Mardelli her primary care physician so that he could refer her to a dermatologist.

Mardelli examined Sofia G. in a closed room with no chaperone. After asking a series of questions regarding her lifestyle, family and medical histories and complaint, he told her to remove her shirt. He placed his hand under her bra and pressed on both of her breasts, telling her she had a cyst on her left breast but that she need not worry about it. As he touched her breasts he looked very nervous and broke eye contact. Mardelli then told Sofia G. he was going to give her a "pelvic exam" and asked her to lower her pants. After putting on a latex glove, he touched her inner thighs, close to her groin, opened her labia and rubbed her clitoris. When asked to describe "what part of [her] vagina [Mardelli] was touching," Sofia G. testified, "My clitoris. Inside. . . . He was touching it with two fingers. He was rubbing up and down in a circular motion and then he went inside 'cause I felt it. . . . He was looking. He actually opened up my [labia] and he

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<sup>1</sup> All statutory references are to the Penal Code.

looked down, tilted his head to see.” She testified he rubbed her clitoris for “[a]bout ten seconds. Eight, ten seconds.” “[I]t felt forever.”

Just before the examination ended, he told her, “You’re a good girl.” Afterward, Mardelli went to his desk and asked questions about her education while he wrote in her medical file. He did not make note of the cyst or vaginal examination in the file. He gave her a referral to a dermatologist and told her to come back in two weeks.

Sofia G. reported the incident to police late that night. Some months later, she made a monitored telephone call to Mardelli from the police department and attempted to elicit an admission that he had given her a pelvic exam and inserted his finger into her vagina. Mardelli denied he had done either. Sofia G. later confronted him at his medical office while wearing a sound transmitter monitored by police. Mardelli again denied giving her a pelvic exam or touching her vagina.

The Los Angeles County District Attorney filed an information charging Mardelli with sexual penetration by a foreign object in violation of section 289, subdivision (d) (count 1), sexual battery by fraud (§ 243.4, subd. (c); count 2), and misdemeanor battery (§ 242; count 3). (Count 3, in which the People alleged Mardelli kissed a medical assistant in another office, is not pertinent to this appeal.) He pleaded not guilty.

At trial, Dr. Denise Sur, an expert witness on the medical standard of care, testified that if a patient presents with a rash on her face and complains of no other medical problem it could be within the standard of care to ask her to disrobe and examine her organ system and skin. It would not be improper in such an examination to palpate the inguinal area, where lymph nodes are located. However, she testified Mardelli had made several simple and “extreme” departures from the standard of care in the course of the examination. Simple departures included palpating Sofia G.’s breasts, making illegible notes, failing to record the vaginal exam, breast exam or cyst, and failing to provide a chaperone during the examination. Extreme departures included “rubbing the vaginal and peri clitoral area” and speculating that a breast cyst is benign. Dr. Sur concluded Mardelli’s examination of Sofia G. was not “by any stretch” a “complete

physical exam” because it did not “have the minimum requirements for the patient’s presentation of a facial rash.”

Mardelli denied giving Sofia G. a pelvic exam or examining her vaginal area, testifying he examined only her “lower abdomen,” “the groin, the lymph node, . . . the inguinal lymph node. I just pulled [her underwear] down up to the . . . upper pubic hairline.” He testified his examination was limited to lymph nodes located perhaps ten inches from the vaginal area.

Mardelli was acquitted on count 1, sexual penetration by a foreign object, but convicted on count 2, sexual battery by fraud. In denying his motion for new trial the court explained its guilt phase analysis: “I found Sofia to be very credible. . . . But you have a young woman who has never been physically examined before. Female organs—sexual organs are not external in the sense that male[s] organs] are. And it appeared because of her naivete, perhaps a failure to understand or really know her own body, and I wasn’t convinced beyond a reasonable doubt that penetration had taken place. I had—I am absolutely convinced beyond a reasonable doubt as to Count 2 that it was sexual and that listening to Dr. Mardelli’s testimony about his checking for lymph nodes and other things that didn’t—especially in the groin and close to the vaginal area did not make sense. . . . [H]is testimony . . . on cross-examination just was not believable.”

Mardelli was sentenced to three years imprisonment, suspended, and placed on five years of formal probation. He timely appealed.

## **DISCUSSION**

Mardelli contends insufficient evidence exists to prove that when he touched Sofia G.’s intimate parts he did so for the purpose of sexual arousal or gratification. We disagree.

“Any person who touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time

unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose, is guilty of sexual battery.” (§ 243.4, subd. (c).) “‘Intimate part’ means the sexual organ, anus, groin or buttocks of any person, and the breast of a female.” (§ 243.4, subd. (g)(1).) “Unlike simple or even felony battery, sexual battery does not result from a simple push or offensive touch. Sexual battery is a specific intent crime. It consists of touching an intimate part of another, . . . committed for the purposes of sexual arousal, gratification or abuse.” (*People v. Chavez* (2000) 84 Cal.App.4th 25, 29.)

“[W]here an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved.” (*People v. Mize* (1889) 80 Cal. 41, 45; *In re Jerry M.* (1997) 59 Cal.App.4th 289, 299.) “[I]ntent is inherently difficult to prove by direct evidence. Therefore, the act itself, together with its surrounding circumstances must generally form the basis from which the intent of the actor may legitimately be inferred.” (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099; see *People v. Lindberg* (2008) 45 Cal.4th 1, 27 [“The jury may infer a defendant’s specific intent to commit a crime from all of the facts and circumstances shown by the evidence.”].) “Circumstances which have been considered relevant to proving intent to satisfy sexual desires include: the charged act, extrajudicial statements, the relationship of the parties, other acts of lewd conduct, coercion or deceit used to obtain the victim’s cooperation, attempts to avoid detection, offering of a reward for cooperation, a stealthy approach to the victim, admonishment of the victim not to disclose the occurrence, physical evidence of sexual arousal and clandestine meetings.” (*In re Jerry M., supra*, 59 Cal.App.4th at p. 299.)

The specific intent with which an act is performed is a question of fact that we review for substantial evidence. (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1008.) “‘When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] ‘This standard applies whether direct or circumstantial evidence is involved.’” (*People v. Avila* (2009) 46 Cal.4th 680, 701.) “Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact’s verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it.” (*People v. Rehmeier* (1993) 19 Cal.App.4th 1758, 1765.)

Mardelli argues he touched Sofia G. only for the purpose of fulfilling his medical duty.

A physician touching a woman’s intimate parts is not an inherently sexual act and does not raise a presumption of sexual intent. However, here the evidence supports a reasonable inference that when Mardelli touched Sofia G.’s breasts and sexual organs he did so for purposes of sexual arousal and gratification.

Dr. Sur testified that although some sort of physical examination would have been proper, Mardelli did not perform a competent examination and his manipulation of Sofia G.’s’ sexual organs was an extreme departure from the standard of care. Dr. Sur also testified Mardelli’s examination of Sofia G. in a private room without a chaperone and his failure to document the scope of the examination constituted additional (albeit simple) departures from the standard of care. A reasonable trier of fact could conclude Mardelli secluded Sofia G. to conceal the impropriety of his actions and continued the concealment by failing to document, and later denying, the scope of examination. Further, at no time did Mardelli discuss with Sofia G. the exact course the examination would take, seek permission for what he was doing, or explain why a vaginal exam was prerequisite to a dermatology referral. A reasonable trier of fact could conclude his

incommunicativeness was designed to give Sofia G. the impression that the examination was necessary and routine.

Mardelli argues no direct evidence of sexual arousal or gratification exists because nothing in his conduct or declarations prior to, at the time of, or after the battery suggested a sexual motive. At trial, the defense examined Sofia G.'s preliminary hearing testimony in which, when asked whether Mardelli "appear[ed] to be sexually aroused in any fashion," she had responded, "No." When asked at the preliminary hearing whether it was "quite the converse," that "[i]t appeared [] he was just doing business," she had answered, "Yes. I mean after—the only time that I did feel it was just kind of weird was when he said, "You're a good girl." She further testified "I could just feel that he felt uncomfortable," he did not react at all, "[e]verything was just very normal, just okay," "[h]e was calm." Sofia G. confirmed her preliminary hearing testimony and, when asked if Mardelli seemed sexually excited or aroused during the examination, testified, "he didn't say anything. He didn't show it on his face but, I mean, there is no way of telling. . . . [Y]ou can't really say, 'oh, he was sexually aroused.' I mean, he didn't—he just seemed very—he just seemed like nothing throughout the whole thing. He just kind of seemed nervous. The only time he seemed nervous was when I looked at him he looked the other way. He just looked towards the ceiling, I think." He seemed "calm" and normal.

Mardelli argues this evidence indicates lack of sexual arousal or gratification.

Mardelli is correct that nothing about his communications or demeanor suggests sexual intent. But in reviewing factual findings for substantial evidence we affirm if any circumstances reasonably justify the findings, even if other circumstances do not. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Mardelli secluded Sofia G., performed an incomplete examination, unnecessarily touched her intimate parts, failed to document the scope of the examination, failed to obtain specific permission to examine her vaginal area, and later denied the examination occurred. Additionally, the manner in which he touched her intimate parts—including rubbed her clitoris up and down in a circular

motion for eight to ten seconds—itself reasonably implies sexual intent. (Mardelli offers no medical justification for this procedure.)

Mardelli argues statements made by the trial court when it denied his motion for new trial indicate the court found some of the alleged touching did not occur, and that which did occur was non-sexual. He argues that because the court did not believe “penetration” had taken place it necessarily found he had not touched Sofia G.’s vagina, vaginal area or clitoris, because “[a]s a matter of anatomy, touching the vagina, vaginal area or clitoris would have required penetration, a point the court recognized in noting that ‘[f]emale organs—sexual organs are not external in the sense that male [sexual organs] are.’”

The argument is without merit. Whatever Mardelli’s understanding of the word “penetration” is, Sofia G. herself distinguished between Mardelli’s touching her clitoris and penetrating her, testifying he rubbed her clitoris “up and down in a circular motion and *then* he went inside . . . .” The trial court could reasonably have concluded from this that Mardelli touched her intimate parts, even if he did not penetrate her.

A young woman presenting to a physician with a rash on her lip was isolated and given a vaginal examination with no explanation or documentation. Though such an examination can in some circumstances be medically proper, substantial evidence supports the trial court’s finding that this one was conducted for Mardelli’s sexual arousal and gratification.



## **DISPOSITION**

The judgment is affirmed.  
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.